Supreme Court, U.S.
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No.02-1145

In The

Supreme Court of the United States

Walter W. Marsh and
Charlotte D. Marsh,
Petitioners

v.

Board of Zoning Appeals of Chesterfield County
and
County of Chesterfield, Virginia

On Petition For Writ of Certiorari
To The Supreme Court of Virginia

REPLY BRIEF

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8 pp

REPLY:

General Statement

The respondents herein do not appreciate the distinction between an adjudicatory hearing with minimal due process, which is constitutionally required to take a citizen's vested property rights, and a political hearing where the exercise of greater political power prevails.

This is a property rights case where vested real property rights are being taken without minimal due process in violation of the U.S. Constitution. This is not a public safety case, a case about an application for new property rights or a case where the petitioners are to be punished or rewarded according to criteria other than the legal criteria for the vesting or taking of property rights. All other issues raised by respondents are irrelevant.

The reasoning of the County is circular and flawed. The County says that because the Marshes do not have the rights the Marshes claim, that the Marshes are not entitled to minimal due process because those rights are reserved for those who actually have the rights they claim. By this reasoning no one is entitled to due process before taking real property rights except those who in the mind of the County have those rights, but, of course, those who have property rights in the County's mind do not need due process because those people will not be challenged. This flawed reasoning continues from the administrator's ruling letter to the BZA hearing, to the trial court where the County argues that the trial court cannot review the constitutional issues presented by the lack of due process and to the Virginia Supreme Court where this circular reasoning continues to hold sway.

The test of whether the Marshes have the right to make these claims which is based on the existence of the elements of their claim based on the duly enacted County ordinance granting the Use Permit and industrial zoning to specified parcels of land, particularly where the first parcel listed in the ordinance is the undisputed predecessor of the Marshes' parcel. The other elements of the Marshes' claim to vested property rights are undisputed and do not need mention here.

It cannot be disputed that the petitioners asked that witnesses be sworn and that they have the right of confrontation at the BZA hearing. It cannot be denied that the Board of Zoning Appeals denied these fundamental requests in the only trial setting the Marshes had which was due to the County's structuring of the legal process. The letter ruling clearly stated that the Marches' sole remedy to prevent the ruling letter from becoming law was to appeal to the BZA within 30 days (App. P. V).

It cannot be denied that the County used unsworn statements about unofficial records to overrule the official County records of their ordinances. It cannot be denied that the later 1972-73 Countywide Rezoning Ordinance was not enacted according to the plain meaning of the Virginia Constitution requiring the vote of the individual Board Members to be recorded. Each adjudicator closed their eyes to this patent flaw in furthering the errors of the Board of Zoning Appeals, by refusing to address due process and constitutional issues based on the erroneous arguments of the County.

Either the Marshes have the Use Permit to operate an airport and industrial zoning or they do not. If they have the facial right as the ordinance says they do, they are entitled to an adjudicatory hearing with sworn witnesses and the right to confront witnesses, before those rights are taken from them. Due process

was denied the Marshes and this Court is the appellate Court of last resort where the violation of these rights can be restored.

OBJECTIONS TO RESPONDENT'S MISSTATEMENTS

1. The trial court upheld the BZA hearing simply because it believed that it did not have the authority to review the constitutional issues presented in the appeal, relying in error on the County's arguments. It believed that the denial of due process in the BZA hearing and the failure of the County to adhere to the provisions of the Virginia Constitution were beyond its reach. The decisions of the Virginia courts regarding the political decisions of the BZA were applied in error to the case at bar, where the BZA was supposed to sit as an adjudicatory body affording at least minimal due process.

2. It is incorrect to call the speakers at the BZA hearing "witnesses" because they were not sworn, and therefore they were incapable of giving "testimony" as we use that term in American jurisprudence.

3. The County did not properly introduce any evidence at the BZA hearing because there was no foundation of testimony supporting it.

4. At the BZA hearing the County sought to deny the effectiveness of the ordinance that enacted the County Airport and Industrial Park. The County sought to degrade its official records and subject them to unofficial records and speculation.

5. The alleged zoning maps used to overturn the plain language of the County Ordinance were unofficial and essentially notes that the planning administrator's office kept without reference as to how the maps were marked or modified and were for a period before the tenure of the administrator who

"testified." Interestingly, discovery would have shown that there was another set of informal maps in conflict with the one the County "introduced."

6. The BZA's and the trial court's reliance on ***Town of Madison v. Ford*** is based on a misinterpretation of the case that voids the requirement of the Virginia Constitution to record the votes of each Board Member in a County government to validly enact an ordinance. That interpretation has been erroneously adopted by a number of Virginia Circuit Courts, but not all, and where this interpretation prevails, the parties in error state that Article 7, Section 7 of the Virginia Constitution, requiring the recording of each Board Members vote to enact an ordinance only operates for ordinances enacted after the date of ***Town of Madison v. Ford.*** It is virtual heresy for a Court to say that it can void a plain and straightforward provision of the Constitution that created it; that it can nullify the plain meaning of a part of the Virginia Constitution. Such acts are ***ultra vires per se*** and should be overturned.

7. The precise statements from the record denying the petitioners the right of confrontation of witnesses are included in the petition for writ (Petition, pp. 6-7). The counsel for the County ruled from the floor that this was not going to be allowed; that the witnesses were held for the BZA panel's questions only, and this was never countered by the panel.

8. Marsh was denied all discovery that could have been permitted by the BZA and instead relied on some freedom of information rights to get some information. This information did not come close to giving Marsh the information he needed to adequately prepare for the BZA hearing.

9. The Marshes never asked for a proceeding that was equivalent to a court; they have always and at each level demanded the minimal due process to which they are constitutionally entitled.

10. It is simply bizarre for the County to try to claim that Marsh chose the BZA as the place to try the "appeal," but really this only merits "trial" of his rights. The County chose to use the zoning administrator's letter ruling to adjudicate the matter and this left the Marshes with no choice but to use the statutorily mandated appeal to the BZA. The County chose the forum where the adjudicator mistakenly thought it had the right to deny the Marshes their U.S. Constitutional rights, all the while opposing the petitioners legitimate requests for minimal due process.

11. There is nothing wrong with the Virginia Supreme Court's decision in ***Town of Madison v. Ford.*** It is the way that the Circuit Courts are interpreting it that is fundamentally flawed. In ***Madison v. Ford***, the Supreme Court upheld a citizen's rightful attack on an unconstitutionally enacted ordinance, just like the attack the Marshes made on the 1972-73 Chesterfield County, countywide rezoning ordinance. In ***Madison v. Ford***, the vote of the Board Members was not individually recorded so the ordinance fell. This parallels what Marsh asked to be done with the 1972-73 countywide rezoning ordinance. The issue is in the interpretation of the Supreme Court's statement that they were not going to strike down all of the government's ordinances on a wholesale basis, but that they would enforce the law of the case ***prospectively***.

The misinterpretation of the Circuit Courts is in their understanding of this statement to mean that ordinances dating from before the ***Madison v. Ford*** case could no longer be attacked on this constitutional basis. This is patently wrong. The court could not say such a thing because it voids the existence and operation of a provision of the Virginia Constitution. A court cannot change the plain meaning of a constitutional provision when it is the very constitution

that created the court and is the very source of its authority.

The correct interpretation of the ruling is that the Virginia Supreme Court would not seek to overturn ordinances helter skelter creating disruption, but warned the governments of counties that in the future it may. The prospective ruling is that it would take another lawsuit to invalidate additional ordinances and that if someone had the spunk and tenacity to survive the legal process that the court would be duty bound to enforce the voting requirement in the Virginia Constitution. This is what the Marshes are respectfully demanding here, that the appellate courts enforce the Virginia Constitutional requirement that the individual votes of the Board Members be recorded or the ordinance fails.

12. Marsh relies on the appellate court system to right these wrongs to his constitutional rights and to right the ***ultra vires*** application of case law that cancels a portion of the Virginia Constitution.

CONCLUSION

The Marshes never had an adjudicatory hearing with minimal due process to take their vested property rights. The County set up the legal procedure so that the Marshes had to appeal to the BZA from the zoning administrator's letter ruling, placing them in the position of having to ask for their minimal due process, and then having the County argue in that forum that the Marshes were never entitled to have minimal due process. Now, at this petition, the County continues to attempt to explain away why the Marshes did not have their minimal due process below by arguing that they were only entitled to a political hearing before a board that could and did refuse to allow the alleged witnesses to be sworn and denied the petitioners the right to confront the County's alleged "witnesses." There will

be no justice for the Marshes unless the United States Supreme Court take this case up. Wherefore, do the petitioners pray that the writ of certiorari be granted.

Respectfully submitted,
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Charlotte D. Marsh

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(Certificate of Service Submitted Herewith)